Supreme Court, U.S.
FILED
FEB 5 2003

No. 02-1013

IN THE

Supreme Court of the United States

NORMAN J. BAU,

Petitioner,

v.

ACTAMED CORPORATION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF GEORGIA

BRIEF IN OPPOSITION

RICHARD R. HAYS
Counsel of Record
LEIGH M. LEVINE
ALSTON & BIRD LLP
Attorneys for Respondent
One Atlantic Center
1201 West Peachtree Street
Atlanta, GA 30309-3424
(404) 881-7000

178791

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

STATEMENT PURSUANT TO RULE 29.6

Respondent Actamed Corporation was merged into Envoy Corporation in 2002 and is now known as Envoy Corporation. Envoy Corporation is a wholly owned subsidiary of WebMD Corporation, a publicly held company.

TABLE OF CONTENTS

	Page
Statement Pursuant to Rule 29.6	i
Table of Contents	ii
Table of Cited Authorities	iii
Jurisdictional Basis	1
Constitutional Provision	1
Statement of the Case	1
Reasons for Denying the Petition	4
I. This Matter Presents No Equal Protection Issue and Does Not Merit the Grant of Certiorari.	4
II. The Court Lacks Jurisdiction Over this Matter.	6
III. Petitioner Failed to Address or Properly Present the Federal Equal Protection Issue to the Lower Courts.	6
IV. Petitioner's Substantive State Law Arguments Are Meritless, As the Lower Courts Have Confirmed.	8
Conclusion	11

TABLE OF CITED AUTHORITIES

Page

Cases:

Adams v. Robertson, 520 U.S. 83 (1997) 1, 6

Caswell v. Anderson, 527 S.E.2d 582 (Ga. Ct. App. 2000) 10

City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432 (1985) 5

Harris v. McRae, 448 U.S. 297 (1980) 5

Yee v. Escondido, 503 U.S. 519 (1992) 6

United States Constitution:

Fourteenth Amendment 1, 5, 7

Statutes:

28 U.S.C. § 1257 ..... 1, 6

O.C.G.A. § 14-2-123(b) 10

O.C.G.A. § 14-2-1103 ..... 4, 8, 9

O.C.G.A. § 14-2-1103(a) 8

Cited Authorities

	Page
O.C.G.A. § 14-2-1106	10
O.C.G.A. § 24-6-5	4, 8
Rule:	
Sup. Ct. R. 10	6
Other Authority:	
Lawrence H. Tribe, AMERICAN CONSTITUTIONAL LAW § 3-24 (2d ed. 1988)	6

JURISDICTIONAL BASIS

Respondent Actamed Corporation submits that this Court is without jurisdiction to grant certiorari and to hear this case for two main reasons: (1) The Supreme Court's review of state court judgments is limited to the federal questions decided by the state courts. 28 U.S.C. § 1257. Because the Petition presents no federal question, this Court lacks jurisdiction over this case; and (2) Further, because Petitioner Norman J. Bau has failed to demonstrate that the lower courts addressed the purported federal issue herein, or even that he properly presented this issue below, the Court lacks jurisdiction. *See Adams v. Robertson*, 520 U.S. 83 (1997).

CONSTITUTIONAL PROVISION

U.S. Const. amend. XIV, § 1

STATEMENT OF THE CASE

Petitioner Norman J. Bau ("Petitioner") is a former employee of Respondent Actamed Corporation, now known as Envoy Corporation, ("Respondent") who contends that he had the contractual right to purchase 3200 Actamed shares as of May 1, 1998, the date his employment ended. Notwithstanding Petitioner's recent, transparent attempt to garb this case in equal protection attire, at the heart of this dispute is an unambiguous contract that the Georgia state courts enforced according to its plain terms.

On or about January 31, 1997, Petitioner and Respondent entered into the employee stock Option Agreement (the "Option Agreement") granting Petitioner an option to purchase 4,000 shares of the common stock of the company.

Record 248-259. The Agreement provided that if Petitioner's employment ended for any reason, his right to exercise his options would also end, except for shares that were already vested as of the date of the termination. Record 252.

The Option Agreement provided that all unvested shares would vest upon a "change in control" of Respondent, so long as Petitioner was employed when the change in control occurred. Record 249. Specifically, the Option Agreement states:

> 1. *Option*
>
> . . .
>
> (c) *Change in Control.* Notwithstanding any provisions in this Agreement to the contrary, in the event of a "change in control" of the Company while the Optionee is in "continuous employment with the Company" (as defined in paragraph 3(b)), this Option shall become immediately exercisable in full. For the purposes of this paragraph 1(c), a "change in control" of the Company shall be deemed to occur if (i) the Company is ***a party to a merger, share exchange or other business combination pursuant to which the Company does not survive or survives as a subsidiary of another corporation***; or (ii) all or substantially all of the assets of the Company are sold or otherwise disposed of.

Id. (emphasis supplied).

On February 24, 1998, Respondent, Healtheon Corporation, and Mednet Acquisition Corporation entered into an Agreement and Plan of Reorganization (the "Plan of Reorganization"), which outlined the terms of a prospective merger. Record 174-238. Under the Plan of Reorganization, the parties were not to merge until all of the conditions set forth in the Plan occurred. Among other things, the Plan contained *five (5)* pages articulating *thirty-three (33)* separate conditions precedent to the consummation of the merger, including for instance, shareholder approval and clearance from a variety of state and federal regulatory authorities. Record 227-232. If all thirty-three of these conditions were not satisfied, there would be no merger. *Id.* Furthermore, the Plan of Reorganization itself provided for a Closing Date of on or around May 15, 1998 and an "Effective Date" as of the date of the filing of the Articles of Merger with the Secretary of the State of Georgia. Record 179.

Respondent terminated Petitioner's employment effective May 1, 1998. Record 170. The merger had not occurred, and the Articles of Merger had not been filed as of this date. Record 170. Petitioner has admitted that "Actamed and Healtheon had not merged prior to the termination of [Petitioner's] employment with Actamed," that "Actamed operated as an independent company after the termination of [Petitioner's] employment with Actamed," and that "Actamed was not a subsidiary of Healtheon" as of May 1, 1998. Record 142, 138. Furthermore, many of the thirty-three conditions in the Plan of Reorganization had not been satisfied as of May 1, 1998, including specifically, but without limitation, the required approval hearing by the California Commissioner of Corporations and shareholder approval. Record 170-171.

On or about May 12, 1999, Petitioner filed his Complaint in Georgia state court, seeking, *inter alia*, specific performance as to some 3,200 shares that had not automatically vested as of the date of his termination. Record 005-023, 007-008. The Georgia trial court granted Respondent's motion for summary judgment. App. 1. The Georgia Court of Appeals affirmed the grant of summary judgment to Respondent on or about March 6, 2002 and subsequently denied Petitioner's Motion for Reconsideration. App. 2, 7. The Georgia Supreme Court denied certiorari. App. 8.

REASONS FOR DENYING THE PETITION

I. This Matter Presents No Equal Protection Issue and Does Not Merit the Grant of Certiorari.

For the first time, Petitioner argues that he has been denied Fourteenth Amendment equal protection on the theory that the state courts incorrectly applied, or failed to apply, Georgia law herein: "When the Georgia case law infers that the Respondent became a 'party to the merger' on February 24, 1998, and the Court of Appeals of Georgia will not apply that case law to the present Action, the Petitioner is being denied equal protection of the law."[1] Pet. at 5. In short, because Petitioner feels the lower courts incorrectly decided this matter, Petitioner believes he has been denied equal protection under the law. This is the sole issue Petitioner has presented for review. Pet. at *i*. Petitioner merely has restated his earlier state law arguments, which have failed numerous times previously, now attempting to garb these arguments in equal protection attire.

1. Although Petitioner references "case law," his Petition later makes clear that he relies on two Georgia statutes, O.C.G.A. §§ 14-2-1103 and 24-6-5, in support of his position that his stock options vested as of the date of his termination. Pet. at 5.

The Fourteenth Amendment to the United States Constitution provides that "[n]o State shall make or enforce any law which shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. The Equal Protection Clause of the Fourteenth Amendment guarantees "a right to be free from invidious discrimination in statutory classifications and other government activity." *Harris v. McRae*, 448 U.S. 297, 322 (1980). The Clause is "essentially a direction that all persons similarly situated should be treated alike." *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 439 (1985).

Petitioner vaguely asserts that he is among a "distinct class of individuals which receive [sic] an improper and incorrect application of a State statute, by the State Courts." Pet. at 5. But there can be no question but that Petitioner has failed to demonstrate that a governmental classification intentionally has subjected him to treatment different from similarly situated individuals and therefore that equal protection is implicated. He simply disagrees with the lower courts' application of Georgia law to the facts of this case. Because Petitioner does not allege any sort of invidious classification, his petition presents no equal protection challenge. Under Petitioner's theory, any adverse decision of any state court concerning state law raises a federal constitutional issue and calls upon this Court to re-examine the lower courts' rulings under applicable state law to ensure that the equal protection guarantee has been met. This theory is fatally flawed. Petitioner's attempt to disguise his disagreement with the state court rulings as an equal protection issue is transparent and unpersuasive.

"Review on a writ of certiorari is not a matter of right, but of judicial discretion" to be granted only "for compelling reasons." Sup. Ct. R. 10. Here, the asserted error consists only of "the misapplication of a properly stated rule of law." *See id.* Accordingly, the grant of certiorari is not merited.

II. The Court Lacks Jurisdiction Over this Matter.

Furthermore, the Supreme Court's review of state court judgments always has been limited to the *federal questions* decided by the state courts. *See* 28 U.S.C. § 1257; Lawrence H. Tribe, AMERICAN CONSTITUTIONAL LAW § 3-24 (2d ed. 1988). Without a federal question presented, this Court lacks jurisdiction over this case.

III. Petitioner Failed to Address or Properly Present the Federal Equal Protection Issue to the Lower Courts.

"With 'very rare exceptions,'" the Court has "adhered to the rule in reviewing state court judgments under 28 U.S.C. § 1257 that [it] will not consider a petitioner's federal claim unless it was either addressed by, or properly presented to, the state court that rendered the decision we have been asked to review." *Adams v. Robertson*, 520 U.S. 83, 86 (1997) (quoting *Yee v. Escondido*, 503 U.S. 519, 533 (1992)). Moreover, when the highest state court is silent on the federal question presented to the Supreme Court, the Court "assume[s] that the issue was not properly presented." *Adams*, 520 U.S. at 86. The Court did not decide whether the rule set forth in *Adams v. Robertson* was "jurisdictional or prudential" but stated that it served "an important interest in comity." *Adams*, 520 U.S. at 90.

Here, the Georgia Supreme Court denied Petitioner's Petition for Certiorari as of September 6, 2002 (App. 8), and thus never addressed the federal equal protection question submitted to this Court. Indeed, contrary to Petitioner's assertion (Pet. at 6), Petitioner's *Petition for Certiorari* submitted to the Georgia Supreme Court never even mentions the Equal Protection Clause of the Fourteenth Amendment, although it briefly references the equal protection clause of Georgia's state constitution. *See* Petitioner's *Petition for Certiorari* to the Supreme Court of Georgia, at 3. *See also Appellant's Motion for Reconsideration* to the Supreme Court of Georgia (no mention of federal equal protection issue). Likewise, the Georgia Court of Appeals decision (App. 2), does not address the federal (or state) equal protection issue, and Petitioner's Courts of Appeals briefs made no mention of any state or federal equal protection issue. *See Brief of Appellant*, *Reply Brief of Appellant*, and *Appellant's Motion for Reconsideration* submitted to the Georgia Court of Appeals. Accordingly, Petitioner has failed to carry his burden of demonstrating that the purported federal issue was addressed by the lower courts or even properly presented to them. Thus, the Court should not grant certiorari to address the purported equal protection issue.

IV. Petitioner's Substantive State Law Arguments Are Meritless, As the Lower Courts Have Confirmed.

Petitioner relies on O.C.G.A. § 14-2-1103[2] in support of his argument that a "change in control" had occurred as of February 24, 1998 when Respondent entered into the Plan of Reorganization and became a "party to a merger." Therefore, he asserts that his shares had vested as of the date of his termination on May 1, 1998. Pet. at 4-5. O.C.G.A. § 14-2-1103 provides as follows:

> After adopting a plan of merger or share exchange, the board of directors of each corporation party to the merger and the board of directors of the corporation whose shares will be acquired in the share exchange shall submit the plan of merger (except as provided in subsection (h) of this Code section) or share exchange for approval by its shareholders.

O.C.G.A. § 14-2-1103(a).

---

2. Petitioner also points to O.C.G.A. § 24-6-5 as having been incorrectly applied below. Pet. at 4. This provision, however, merely provides that "[e]vidence of known and established usage shall be admissible to aid in the construction of contracts." O.C.G.A. § 24-6-5. This provision has no bearing herein because the Option Agreement is unambiguous on its face and should be enforced according to its terms, as the Georgia Court of Appeals found (App. 4-5) and as Petitioner has earlier acknowledged. *See Petition for Certiorari* to the Georgia Supreme Court, at 3 ("The words of the Agreement defining 'Change in Control' are precise and clear.").

O.C.G.A. § 14-2-1103, however, plainly sets forth the mandatory procedure for a board of directors to follow to obtain shareholder approval and makes clear that shareholder approval is a condition precedent to a merger or share exchange under Georgia law. By no means does this code section support Petitioner's proposition that a "change of control" had occurred, or "was occurring," prior to the time that shareholder approval was obtained and the merger actually took place. At bottom, Petitioner's argument that Respondent was a "party to a merger" prior to May 19, 1998 is nonsensical and turns the plain language of the Option Agreement on its head. As noted by the Georgia Court of Appeals, "To be a party to a merger, there must be a merger, not simply a plan to merge." App. 5.

Under the unambiguous terms of the Option Agreement, the "change of control" did not occur until Respondent ceased to exist as an independent entity and/or became a subsidiary of another corporation. Simply by entering into the February 24, 1998 Plan of Reorganization, Respondent had not ceased to survive and/or had not become a subsidiary of Healtheon. By its own terms, the Plan of Reorganization was merely a "plan" for a prospective merger which could actually occur in the future if all thirty-three (33) express conditions precedent set forth therein were fulfilled. The record is uncontroverted in this case that many of these conditions precedent, including the required approval hearing before California's Commissioner of Corporations and shareholder approval, had not occurred as of the date of Petitioner's termination. Record 170-171. Accordingly, there can be no question but that the merger had not, and indeed could not, have occurred as of May 1, 1998. Moreover, as emphasized by the Georgia Court of Appeals (App. 5), there can be no question that as of the date of Petitioner's termination, the merger may not have occurred at all.

Rather, Respondent ceased to "survive or survive[d] as a subsidiary of another corporation," and the "change in control" was effected, only when the merger ultimately occurred. *See* O.C.G.A. § 14-2-1106 (it is only "[w]hen a merger takes effect" that "every other corporation party to the merger merges into the surviving corporation and the separate existence of every corporation except the surviving corporation ceases"). The Plan of Reorganization itself provided for a Closing Date of on or around May 15, 1998 and an "Effective Time" as of the date of the filing of the Articles of Merger with the Secretary of the State of Georgia. Record 179. The merger had not closed, the Articles of Merger had not been filed, and the merger thus was not "Effective" as of May 1, 1998. Record 170. Georgia law even expressly provides that a merger document may provide for a delayed effective date. O.C.G.A. § 14-2-123(b). Thus, according to the Plan of Reorganization itself and Georgia law, the merger and resulting "change in control" had not occurred as of May 1, 1998. Contrary to Petitioner's urgings, and as the lower courts held, the Option Agreement is unambiguous on its face and therefore should be enforced according to its terms.[3] *Caswell v. Anderson*, 527 S.E.2d 582, 582 (Ga. Ct. App. 2000).

In summary, Petitioner's arguments as to why the lower courts incorrectly applied Georgia law are without merit, and plainly do not translate into a federal equal protection issue.

---

3. Indeed, although Petitioner now argues that the Option Agreement is ambiguous (Pet. at 8), he previously has conceded that it is unambiguous. *See Petition for Certiorari* submitted to the Georgia Supreme Court, at 3 ("The Words of the Agreement defining 'Change in Control' are precise and clear.").

CONCLUSION

For all of the foregoing reasons, Respondent respectfully requests that the Court deny certiorari herein.

Respectfully submitted,

RICHARD R. HAYS
Counsel of Record
LEIGH M. LEVINE
ALSTON & BIRD LLP
Attorneys for Respondent
One Atlantic Center
1201 West Peachtree Street
Atlanta, GA 30309-3424
(404) 881-7000